UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES MCLAUGHLIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 94-389-P-C***
	)	
JOHN H. DALTON, ***)***		
Secretary of the Navy, et al., ***)***		
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff in this proceeding lost his job as a pipefitter at the Portsmouth Naval Shipyard in 1992 and appears, *pro se*, seeking reinstatement to his position and damages. Before the court now is a motion to dismiss the pending claims, which allege violation of the provisions in the Rehabilitation Act prohibiting disability discrimination in federal employment, 29 U.S.C. §§ 791, 794a, and the analogous provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34. The asserted ground for the motion is that the plaintiff has failed to exhaust administrative remedies in a timely manner, which the defendants contend is required by both statutes. For the reasons that follow, I recommend that the court grant the motion.

I. Background and Procedural History

The plaintiff began this action in June 1994 by filing with the U.S. District Court for the District of New Hampshire a motion to proceed *in forma pauperis*. The court granted the plaintiff's motion, solely for the purpose of waiving its filing fee and the fees associated with service of

process. The plaintiff thereafter filed his *pro se* complaint, a document characterized by a magistrate judge as "thirteen confused handwritten pages of unnumbered allegations." Report and Recommendation (Docket No. 1-F) at 1. Reviewing the complaint, the magistrate judge pinpointed six causes of action: abuse of legal process, negligence, fraud, deceit, misrepresentation, violation of the Rehabilitation Act and violation of the ADEA. *Id.* Pursuant to 28 U.S.C. § 1915(d), the court undertook a preliminary review of the complaint before directing the completion of service on the plaintiff's behalf and dismissed all counts except those arising under the Rehabilitation Act and the ADEA, as subsequently amended by the plaintiff. *Id.*; Order (Docket No. 1-J). The complaint was then served on the defendants.[1]

Thereafter, the defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(3) and (6) contending that the District of Maine is the proper venue for this action and arguing that the plaintiff failed to exhaust the required administrative remedies in a timely manner as to both his age and disability discrimination claims. In response, the plaintiff filed a series of motions, which the court treated as a timely response to the motions filed by the defendants. Thereupon, the court entered an order transferring venue to this district without acting on the defendants' motion to dismiss. *See* Order (Docket No. 1).

[1] The plaintiff originally named as defendants the U.S. Department of the Navy and the Portsmouth Naval Shipyard. The court granted the plaintiff's subsequent motion to amend the complaint to name as a defendant John H. Dalton, the Secretary of the Navy. *See* endorsement on Motion to Amend (Docket No. 1-N).

II. Standard for Reviewing Motion to Dismiss *and Pro Se* Response

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendants are entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

In reviewing the allegations in a *pro se* complaint, the court holds the *pro se* litigant to a less stringent standard than that which would be applied to a formal pleading drafted by a lawyer. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980) (*pro se* complaints to be read "generously"). This liberal pleading standard applies only to a plaintiff's factual allegations. *Neitzke v. Williams*, 490 U.S. 319, 330-31 n.9 (1989). Thus, a *pro se* complaint is subject to dismissal pursuant to Rule 12(b)(6) when the complaint sets forth in sufficient detail the facts alleged by the plaintiff and "a lenient construction demonstrates beyond doubt that the plaintiff can prove no set of facts to support [his] claim for relief." *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 260 (1st Cir. 1994).

III. The Rehabilitation Act Claim

The defendants contend that the plaintiff can prove no set of facts to support a claim for relief under the Rehabilitation Act and the ADEA because both statutes condition such relief on the timely

pursuit of administrative remedies before the Equal Employment Opportunity Commission ("EEOC") and the plaintiff has failed to avail himself of these remedies.[2]

The Rehabilitation Act gives a plaintiff who has been the victim of disability discrimination by an employing federal agency a private right of action against the agency. 29 U.S.C. § 794a(a)(1); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). Section 794a(a)(1) achieves this objective by making available to the plaintiff the remedies, procedures and rights set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16. Section 794a(a)(2) further makes available the remedies, procedures and rights set forth in Title VI of the Civil Rights Act "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." As the Eleventh Circuit noted in *Doe*, the question of whether paragraph (1) or paragraph (2) of this subsection applies to a claim against a federal employer, and thus whether Title VII or Title VI is applicable, has great significance because only Title VII imposes a requirement that the plaintiff exhaust administrative remedies prior to filing suit. *Doe*, 903 F.2d at 1460. The *Doe* court concluded that plaintiffs seeking redress against a federal agency employer must proceed under paragraph (1), noting that Title VII is the exclusive remedy for federal employees alleging other forms of discrimination and it would be untenable to determine that Congress intended the handicapped, "alone among federal employees or job applicants complaining of discrimination[,] to bypass the administrative remedies in Title VII."[3] *Id*. (quoting *McGuinness v. United States Postal Serv*., 744

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[2] The plaintiff did appeal his dismissal to the Merit Systems Protection Board and the U.S. Office of Special Counsel, but did not raise the allegations of discrimination that are at issue in the present proceeding. *See* Exhs. C and E to Defendant's Motion.

[3] The *Doe* court noted that three circuits have gone further, holding private actions against (continued...)

F.2d 1318, 1322 (7th Cir. 1984)); *see also Khader v. Aspin*, 1 F.3d 968, 971 n.3 (10th Cir. 1993). This analysis is reasonable, and consistent with the language of section 794a(2) itself, which makes Title VI applicable only to claimants aggrieved by acts of providers or recipients of federal "assistance." Accordingly, I conclude that a plaintiff who seeks civil remedies for alleged discrimination by a federal employer based on disability is required to exhaust the administrative remedies set forth in Title VII.

In his written response to the defendants' motion, the plaintiff appears to concede that he has not exhausted the administrative remedies set forth in Title VII in pursuit of his disability discrimination claim. Instead, he describes a conversation he had with a counselor from the shipyard's equal employment opportunity office at the time of his discharge:

> Even at this time, when I questioned the E.E.O. counselor in 1992, the Rehabilitation Act of 1973 was not even mentioned, this is why I didn't file a complaint in conjunction with this law until 4/30/94. I had not been informed of it until I received the pamphlet from the E.E.O. in Washington, D.C.

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[3](...continued)
federal employers may not be brought under section 794 at all, but only pursuant to section 791 of the Rehabilitation Act and the Title VII remedies of section 794a(a)(1). *Id*. Section 791 sets forth certain special obligations of the federal government in taking affirmative action to employ the disabled. Subsequent to *Doe*, Congress amended this section to provide that:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 791(g). Since the defendants contend, and the plaintiff appears to agree, that section 794 is the solely applicable section of the Rehabilitation Act, I do not address the question of whether, or to what extent, section 791 or the Americans with Disabilities Act is applicable to the plaintiff's claim of discrimination based on disability.

> This is why I didn't file a discrimination complaint against [Portsmouth Naval Shipyard] until 1994 because in fact, I had been misinformed of possible discriminatory actions, I could file suits against.

Plaintiff's Motion to Quash Affadavits [sic] (hereinafter "Plaintiff's Response") (Docket No. 4) at 2-3.[4] This is consistent with the relevant allegation in the plaintiff's complaint, *viz*:

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[4] The affidavits the plaintiff seeks to "quash" are those attached by the defendants to their motion to dismiss. The first affidavit, executed by James E. Fender, legal counsel to Portsmouth Naval Shipyard, relates to the question of venue and thus is not material to the Rule 12(b)(6) motion. *See* Affidavit of James E. Fender, appended as unnumbered exhibit to Defendant's Motion to Dismiss Pursuant to 12(b)(3) and 12(b)(6) ("Defendant's Motion") (Docket No. 2). The second affidavit, also executed by Fender, seeks to establish, *inter alia*, that the plaintiff never discussed his claims of discrimination with the shipyard's employee assistance or equal opportunity officers. *See* Affidavit of James E. Fender ("Second Fender Affidavit"), Exh. A to Defendant's Motion, at 1-3. Subsequent to the filing of the Plaintiff's Response, the defendants have sought leave to file a third affidavit, executed by Lorrie Oeser, an equal employment specialist at the Portsmouth Naval Shipyard. *See* Motion for Leave to File the Appended Affidavit of Lorrie Oeser ("Oeser Motion") (Docket No. 8). Oeser states that she has no knowledge of any discrimination allegations brought to the attention of equal employment officials at the shipyard by the plaintiff, and, as the person at the shipyard in charge of formal equal opportunity complaints, she learns about all such allegations, either formal or informal. *See* Affidavit of Lorrie Oeser ("Oeser Affidavit"), appended to Oeser Motion, at 3.

Rule 12(b) provides that when a party seeks dismissal pursuant to 12(b)(6) for failure to state a claim and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment" pursuant to Rule 56. However, a motion to dismiss is not automatically converted to a summary judgment motion when the moving party files matters outside the pleadings. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18 (1st Cir. 1992). The court may choose to ignore the supplementary materials, in which case the standards applicable to Rule 12(b)(6) apply. *Id*. Such a choice is the appropriate one when the supplementary materials do not comply with the requirements of Rule 56(e) or are not otherwise evidence that would be admissible at trial. *Early v. Bankers Life & Casualty Co*., 959 F.2d 75, 78 (7th Cir. 1992); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright & Miller") § 2721 (1983) at 40 (noting that the particular forms of evidence mentioned in Rule 56(e) are not the exclusive means of presenting such supplementary materials).

Rule 56(e) provides that affidavits "shall be made on personal knowledge, shall set forth such facts as shall be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." Fed. R. Civ. P. 56(e). The relevant factual assertions made in the Second Fender Affidavit are not based on personal knowledge, but on Fender's interviews with three other employees of the shipyard who contend that the plaintiff never consulted them about his

(continued...)

> After continued appeals to various agencies within the federal government's administrative appeals process over the past (2) two + years, I was finally informed of my right to file suit in US District Court on discrimination grounds, even though I had complained in my submissions to the appellate agencies of various discriminatory practices by the [shipyard] prior to my separation on 5/23/92.
>
> As a matter of fact, I had even complained to an EEO cou[n]selor at the [shipyard] prior to being separated. But according to this counselor I did not have any grounds of discrimination to complain about.

Complaint at 2.

In cases brought pursuant to Title VII, "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc*., 455 U.S. 385, 393 (1982); *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (equitable tolling available in cases alleging discrimination by federal employer). Although the plaintiff nowhere mentions "equitable tolling" in his pleadings, in accordance with the generous construction to be given *pro se* pleadings I infer that the plaintiff relies on this principle to justify his failure to pursue administrative remedies for his disability discrimination claim.

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[4](...continued)
allegations of discrimination. *See* Second Fender Affidavit at 1. I treat the plaintiff's motion to quash the Fender affidavits as a timely motion to strike. *See Casas Office Mach., Inc. v. Mita Copystar Am., Inc.*, No. 94-1067, slip op. at 36 (1st Cir. Dec. 14, 1994) (objections to Rule 56(e) affidavits waived absent motion to strike). Accordingly, pursuant to Rule 12(b)(6), this affidavit is insufficient to transform the motion to dismiss into a summary judgment motion and will, therefore, be disregarded.

The Oeser Affidavit is also fatally flawed. Although it is a signed statement that purports to have been made "under oath," the affidavit is neither a sworn statement nor made under penalty of perjury. Accordingly, I deny the defendants' motion for leave to file it. *See* 10A Wright & Miller § 2738 (1983) at 499-500; 28 U.S.C. § 1746 (unsworn affidavit admissible if made under penalty of perjury).

So construed, the plaintiff's Rehabilitation Act claim is nearly identical to the situation confronted by the Eleventh Circuit in *Grier v. Secretary of the Army,* 799 F.2d 721 (11th Cir. 1986). The plaintiff in *Grier* alleged that racial discrimination was the basis for her discharge from civilian military employment and she therefore brought a Title VII claim. *Id*. at 723-24. The plaintiff never filed a formal charge of racial discrimination, but contended that she should be excused from such a requirement because a personnel officer at her employing facility, as well as a regional office of the EEOC, had counseled her not to file such a charge. *Id*. at 724. The court rejected this argument because,

> even if [the plaintiff's] version of events is assumed to be true, such equitable considerations are relevant to whether the timeliness requirement for filing a charge should be subject to equitable tolling, not whether a charge must ever be filed at all; it is her failure to exhaust or even begin her administrative remedies that bars her suit.

Id. (citing *Siegel v. Kreps*, 654 F.2d 773, 777 (D.C. Cir. 1981). The court noted that equitable tolling might apply to the circumstances of the plaintiff's claim, but that the proper forum for making such an argument would be the administrative agency itself. *Grier*, 799 F.2d at 724. By way of contrast, the Supreme Court's more recent holding in *Irwin*, that the equitable tolling doctrine does apply in Title VII suits in which a federal employer is the defendant, involved a plaintiff's failure to file a timely complaint in court following the receipt of an unfavorable determination by the EEOC. *See Irwin*, 498 U.S. at 91, 95-96. And *Zipes*, in which the Supreme Court first discussed the application of equitable principles to the timely filing of an EEOC complaint prior to judicial proceedings under Title VII, stands only for the proposition that the timely filing of an EEOC complaint is not a jurisdictional prerequisite to bringing such a suit in federal court. *See Zipes*, 455 U.S. at 392-93. In other words, while a court would not be jurisdictionally barred from considering

whether the administrative filing deadline should be tolled, a claimant must still exhaust administrative remedies and present the equitable argument to the EEOC before his claim for judicial relief is ripe. *Cf. Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181, 185 (1st Cir. 1989) (plaintiff did not meet "exacting standard" for equitable tolling of limitation period for Title VII claim; administrative proceedings were "inconclusive"). Since the plaintiff here has never formally brought his Rehabilitation Act claim to the attention of the EEOC, his pending claim of disability discrimination must be dismissed.

IV. The ADEA Claim

The same logic does not automatically apply to the plaintiff's claim of age discrimination, however. Although the defendants contend they are entitled to dismissal of the ADEA claim as well, on the ground that the plaintiff has failed to exhaust administrative remedies before the EEOC, they overlook the explicit absence of such an exhaustion requirement in the ADEA. Subject to exceptions that are not relevant here, section 633a of the ADEA forbids federal civilian employers from engaging in discrimination based on age in connection with "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. § 633a(a). Unlike the Rehabilitation Act, the ADEA does not include a provision making the Title VII remedies applicable to claimants who seek judicial relief for claims of discrimination by federal employers. Rather, a victim of age discrimination by a federal civilian employer may, at his option, pursue his claim with the EEOC, which is authorized to grant appropriate remedies. *See id*. at subsection (b). However, a claimant may also elect to bring his case to the attention of the court in the first instance. *Id*. at subsection (c); *Stevens v. Department of Treasury*, 500 U.S. 1, 6 (1991).

In the latter case, the ADEA explicitly provides that

> no civil action may be commenced by any individual under [section 633a] until the individual has given the [EEOC] not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.

29 U.S.C. § 633a(d). Thus, the relevant question is not whether the plaintiff here has exhausted any remedies that would have been available to him before the EEOC, but whether he notified the EEOC of his intent to sue within 180 days of the alleged discriminatory act. *See Stevens*, 500 U.S. at 7-8 (holding that a plaintiff who provides such a timely notice, and then waits at least 30 days to file a complaint, may wait longer than 30 days to file suit as long as he acts within the applicable limitation period).

The plaintiff appears to concede that he has neither pursued his age discrimination complaint with the EEOC nor provided the agency with the 180-day notice required by section 633a(d). Tellingly, the plaintiff's complaint even admits of doubt as to whether he may pursue an ADEA claim in the circumstances:

> At the time of my original complaints to the appropriate agencies, I did not complain of age discrimination. But I should have, am I still eligible to include that in my suit? At the time of separation I was 40 [years] 4 [months] old, birth date 12/30/51 separated 5/23/92.

Complaint at 9. The plaintiff's response to the motion to dismiss further contends that he spoke with an equal employment opportunity counselor at the shipyard in 1992 and was

> informed by the person I spoke to at that particular time in 1992, that I had no grounds on which to file a complaint of age discrimination. This is the reason I didn't raise the age discrimination issue until the April 30, 1994 complaint.

Plaintiff's Response at 1. According to the plaintiff, he was told that, if an ADEA violation had taken place, it would have had to have occurred on the date in 1991 when the shipyard "first

requested R.I.F. approval," rather than on the date of his discharge in 1992, and that on the former date he had no claim because he was not yet 40 years old. *Id*.

The present posture of the case does not require me to determine whether this was sound legal advice, since the defendants do not seek to dismiss the plaintiff's ADEA claim on the ground that he was not yet 40 years old on the date any discrimination would have occurred. The question before the court is what effect to give the plaintiff's failure to comply with the notice requirement in section 633a(d). Unfortunately, the court is left to infer this argument by the defendants from their erroneous contentions that the plaintiff's failure to exhaust administrative remedies precludes judicial relief[5] and that 29 C.F.R. § 1613 required him to make such a complaint to the EEOC within 30 days of the alleged discriminatory act. *See* Defendant's Motion at ¶ 14. In fact, the cited regulations concern the manner in which federal agencies internally process complaints of discrimination; an entirely different set of regulations applies to the submission of age discrimination complaints to the EEOC. *See* 29 U.S.C. §§ 1613.501-.521; 1613.214(a)(1)(i); *see also* 29 C.F.R. § 1614.201 *et seq*. Their careless pleading notwithstanding, the defendants properly bring to the court's attention the plaintiff's failure to notify the EEOC of his intent to bring suit, as required by the ADEA. Such a failure generally warrants the dismissal of the plaintiff's complaint. *See Castro*, 775 F.2d at 403.

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[5] The defendants' contention that a failure to exhaust administrative remedies justifies dismissal of the plaintiff's ADEA claim might be correct if the plaintiff had first opted for the EEOC complaint process but then abandoned it. *See Castro v. United States*, 775 F.2d 399, 404 (1st Cir. 1985). Other circuits have found no exhaustion requirement in these circumstances, and the Supreme Court has declined to resolve the conflict. *See Stevens*, 500 U.S. at 8-11; *see also Adler v. Espy*, 35 F.3d 263, 264-65 (7th Cir. 1994). The EEOC's own regulations provide that a claimant who opts for the administrative route is deemed to have exhausted his remedies when 180 days have elapsed from the filing of the administrative complaint without final agency action. *See* 29 C.F.R. § 1614.201(c)(1).

As with the Rehabilitation Act claim, a generous reading of the plaintiff's response concerning the ADEA claim suggests a contention that the court should toll or suspend the filing requirement for equitable reasons. The First Circuit has stated that the requirements of section 633a(d) are "subject to modification or excuse for equitable reasons" if the employing agency actually prevented the plaintiff from contacting the EEOC or filing a notice of intent to sue. *See id.* at 403 n.4. In a related context, i.e., whether the 30-day limitation period that follows final EEOC action can be equitably tolled, the First Circuit has suggested that the doctrine would apply "where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction." *Lavery v. Marsh*, 918 F.2d 1022, 1027 (1st Cir. 1990) (quoting *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984)).[6]

The only act by the defendants that is cited by the plaintiff to justify his failure to comply with the notice requirement is the rendering of advice from one of the shipyard's equal employment counselors that the plaintiff did not have a valid ADEA claim. This falls even shorter of the mark than did the conduct that failed to justify equitable tolling in *Castro*, in which a former employee filed an informal grievance memo with the employing agency, which informed the employer that a decision not to extend a temporary appointment was not covered by the agency's grievance procedures. Nothing the shipyard did here can remotely be described as an affirmative act that prevented the plaintiff from notifying the EEOC that he intended to press a claim of age discrimination in court. Since equity does not demand that the plaintiff be excused from the

[6] *Lavery* also lists other circumstances in which equity might justify tolling the limitation period following final EEOC action, but they clearly do not apply to the question of providing timely notice to the EEOC: receipt of inadequate notice from the commission, where a motion for appointment of counsel is pending, or where the court has led the plaintiff to believe he had done everything required of him. *Id.*

requirements of section 633a(d), the plaintiff's failure to comply with these requirements compels the dismissal of his ADEA claim.

V. Conclusion

Accordingly, I recommend that the defendants' motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 20th day of January, 1995.

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David M. Cohen
United States Magistrate Judge